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No. 93-694

In the Supreme Court of the United States

OCTOBER TERM, 1993

FRANCIS and MARGARET PISCIOTTA,
PETITIONERS

v.

SMITH BARNEY SHEARSON

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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Petitioners, Francis Pisciotta and Margaret Pisciotta, respectfully submit this brief reply to the opposition of respondent Smith Barney Shearson ("Shearson") to the Pisciottas' petition for a Writ of Certiorari.

The recent decision by the United States Court of Appeals for the Second Circuit in Mian v. Donaldson, Lufkin & Jenrette Securities Corp., Docket No. 92-9166 (2d Cir. Oct. 18, 1993) (per curiam), conflicts with the instant opinion of the District of Columbia Court of Appeals and further demonstrates the need for this Court to resolve the scope of Section 12 of the Federal Arbitration Act ("FAA").

In Mian, the court found that the applicable limitations period for a complaint of civil rights violations during an arbitration proceeding is the three year statute for civil rights actions, not the FAA. The court noted its decision was not

"free of all doubt, and until the Supreme Court tells us otherwise." The court also stated that having the arbitration award as a major component of the damages sought did not mean that the suit challenged the award within the meaning of Section 10 of the FAA.

Although Mian dealt with civil rights, the issue presented here also is no less important or fundamental to securities arbitration. The issue here is the very integrity of the process -- the right to insist that a contract to arbitrate be fulfilled in good faith and not be a vehicle for withholding critical evidence and using perjured testimony.

The Pisciottas also note that the repeated references to the District of Columbia Arbitration Act are a red herring meant to divert the Court's attention from Shearson's true position, i.e., that the

Pisciottas' claims were time barred before the Pisciottas learned of them. The instant dispute arose between District of Columbia investors, a New York brokerage firm and involved a national securities exchange. As such, the contract to arbitrate involves interstate commerce and the provisions of the FAA and not state law govern, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Shaddock, 822 F.Supp. 125, 131-32 (S.D.N.Y. 1993); Barbier v. Shearson Lehman Hutton, 948 F.2d 117 (2d Cir. 1991); and the FAA does not permit motions to vacate beyond three months. Florasynth, Inc. v. Pickholz, 750 F.2d 171, 175-77 (2d Cir. 1984).

Here, as the complaint alleges, Shearson deliberately withheld from its required public reports notice of the criminal activity of its registered representative until three months after the

Pisciottas' award. Leaving the Pisciottas without a remedy would endorse Shearson's deceptive practice and immunize Shearson's successful deceit.

Finally, the Pisciottas submit that it is they and not Shearson who are attempting to promote securities arbitration. As Shearson acknowledges, the Pisciottas voluntarily submitted their original claims to arbitration, clearly expecting Shearson to execute their agreement to arbitrate in good faith. After learning of Shearson's cover-up, the Pisciottas again turned to arbitration. When the Director of Arbitration of the National Association of Securities Dealers ("NASD"), at the request of its member, Shearson, declined the use of its facilities after a year of deliberation, the Pisciottas sought judicial assistance in preserving the integrity of the arbitration process.

Securities arbitration is conducted in an industry forum under industry rules. The only meaningful protection afforded customers in securities' arbitration is the right to have the contract to arbitrate carried out in good faith and fair dealing. When, as here, that contract has been fragrantly breached and egregious fraud has occurred which would not have been known to claimants within three months after an award, an independent action must be available.

Shearson's misconduct constitutes matters which were not included in the original Statement of Claim between the Pisciottas and Shearson. Shearson's misconduct relates to matters which were not submitted to arbitration or decided by arbitrators. An independent action to address Shearson's fraud has been timely filed and should be permitted.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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